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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 402

CHARLIE LOVE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The oral opinion of the District Court (R. 20-22) is not reported. The *per curiam* opinion of the Court of Appeals (R. 24-26) is reported at 170 F. 2d 32.

JURISDICTION

The judgment of the Court of Appeals was entered on October 9, 1948 (R. 27). The petition for a writ of certiorari was filed on November 8, 1948. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

A United States Marshal, armed with a properly issued warrant for the arrest of one Foster,

entered petitioner's house without objection by him upon reliable information that Foster was there. While so looking for Foster, the Marshal saw illegal whiskey being filtered. Petitioner was arrested and further search of the house revealed an illicit still. The question is whether petitioner's rights under the Fourth Amendment were violated.

STATUTES INVOLVED

Revised Statutes, §§ 787-788, as amended, 28 U. S. C. (1946 ed.) 503-504 (now 28 U. S. C. 547, 549), provided:

> It shall be the duty of the marshal of each district to attend the district courts when sitting therein and to execute all lawful precepts issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty.
>
> The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.

The Act of March 1, 1879, c. 125, sec. 9, 20 Stat. 327, 18 U. S. C. (1946 ed.) 593 (repealed under the recent revision of Title 18 of the United States Code [1]), provided in pertinent part:

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[1] The statute was repealed because its provisions were already covered by 28 U. S. C. (1946 ed.) 503 and 504, *supra*, by Rule 5 (a), F. R. Crim. P., and by revised 18 U. S. C. 3053.

> Where any marshal or deputy marshal of the United States within the district for which he shall be appointed shall find any person or persons in the act of operating an illicit distillery, it shall be lawful for such marshal or deputy marshal to arrest such person or persons, * * *.

STATEMENT

A four-count indictment was filed in the District Court for the Middle District of North Carolina charging that on May 6, 1948, petitioner had committed various violations of the Internal Revenue Code relating to liquor (26 U. S. C. 2810, 2833, 2834, 2803) (R. 1-2). Before trial, petitioner moved that the evidence against him be suppressed on the ground that it had been obtained by an illegal search of his home (R. 3-5). He waived trial by jury and consented that the evidence be presented at the trial, subject to the court's decision on the motion to suppress. The court heard the evidence, overruled the motion, and found petitioner guilty on all counts. The sentence imposed was a penalty of $500, a fine of $1,000, and imprisonment for eighteen months (R. 22.) The judgment was affirmed on appeal (R. 27).

The evidence adduced by the Government on the merits and on the motion to suppress is undisputed and may be summarized as follows:

On May 6, 1948, Agent Dotson of the Alcohol Tax Unit obtained from the United States Commissioner a warrant for the arrest of one Ray Foster, which he delivered to Deputy United

States Marshal Irwin for execution (R. 7, 11-12). That afternoon, Deputy Marshal Bessant received information from a reliable source that Foster would be either at the home of his mother or at petitioner's home that night. Bessant communicated this information to Irwin, but was then called away to another part of the district. (R. 6, 8, 9, 10, 16-17, 18.) There was testimony that when the deputy marshals have arrest warrants to execute, they customarily take along other officers to prevent escapes, and that the deputies and the agents of the Alcohol Tax Unit frequently call upon each other for help in cases of this sort (R. 10, 11, 14, 17). Since Bessant was unavailable, Irwin asked Agents Dotson and Kiefer to accompany him to assist in executing the warrant for Foster's arrest (R. 10, 11-12, 17).

That evening, Irwin, accompanied by Dotson and Kiefer, went to the home of Foster's mother, which Irwin searched without finding Foster (R. 6, 9, 18). They then went to petitioner's home, which was 400 yards to half a mile distant (R. 6, 9). Stationing Kiefer at the front and Dotson at the back, Irwin went to the back door and asked petitioner whether Foster was there. Petitioner said he was not. Irwin told petitioner that he had a warrant for Foster, that he had information that Foster was in petitioner's house, and that he would have to investigate (R. 6-7, 8). Without objection by petitioner, Irwin walked into the house,

and pushing open a door on the right, he saw a filter plant in operation containing about 15 gallons of illicit whiskey (R. 6-8). Irwin immediately called Dotson, saying, "I have got more than I can handle" (R. 7, 8, 12). Dotson entered and, seeing the filter plant, immediately placed petitioner under arrest (R. 9, 12, 13). A further search by Dotson revealed more illegal whiskey in a room across the hall; in the basement he found hot mash and a still which had recently been in operation (R. 7, 13).

Later that night, in pursuance of further information received after they left petitioner's home, the three officers continued their search for Foster by looking for him at the home of George Hendren (R. 15-16).

During cross-examination of Irwin, the court asked whether his entrance into petitioner's house was in good faith or was merely a ruse. Irwin replied that he acted in good faith and that he had no prior information of any violations occurring in petitioner's house (R. 9; cf.R. 19). The court also carefully questioned Dotson as to whether he accompanied Irwin as a ruse to search petitioner's house for a still, but Dotson insisted that his only purpose was to aid Irwin in arresting Foster (R. 14, 18-19; cf. R. 12). During the course of this examination, Dotson said that about a month earlier, on April 3, 1948, he received some information of a very indefinite nature that peti-

tioner might have a distillery in his house; this was the only report he heard and it was all the information he had about petitioner (R. 18-19).

Petitioner did not take the stand and offered no evidence in his own behalf (R. 19). The trial court found as a fact that the officers entered petitioner's house in good faith and observed the violations in the course of their search for Foster; the court concluded that since the officers were lawfully on petitioner's premises they had a right to arrest petitioner and seize the evidence (R. 20-21).

ARGUMENT

Petitioner contends (Pet. 5) that the officers, not having sufficient information of a violation on his premises to obtain a search warrant, obtained entrance under a pretext of looking for Foster. We quite agree that if these had been the facts the search would have been illegal. But petitioner is precluded on this issue by the findings of the trial court. For the court, after carefully cross-examining the officers, found upon the undisputed evidence that they acted in good faith with reasonable grounds for belief that Foster, for whom they had a warrant of arrest, was in petitioner's house.

In these circumstances, there can be no doubt that Deputy Marshal Irwin had the right to enter petitioner's house to search for Foster. United States marshals and their deputies have in each State, the same powers in enforcing federal laws as the sheriffs of the State have in executing state

law. 28 U. S. C. 504, now 28 U. S. C. 549 (*supra*, p. 2); *United States* v. *Di Re*, 332 U. S. 581, 590; *Cline* v. *United States*, 9 F. 2d 621 (C. A. 9); *United States* v. *Sully*, 56 F. Supp. 942 (S.D. N.Y.). Under the law of North Carolina, a sheriff, armed with a valid arrest warrant and acting in good faith in the belief that the person named in the warrant is within premises where the sheriff seeks to find him, may even break down the doors in order to gain entry and execute the warrant, and this even though the house be that of a third party. Nor is it material that the person sought is not found within the house, so long as the officer had reasonable grounds for belief that he was there. *State* v. *Mooring*, 115 N. C. 709 (1894); *State* v. *Shook*, 224 N. C. 728, 733 (1944). This North Carolina law conforms to the common law and the generally accepted practice in other states. *United States* v. *Faw*, 1 Cranch C. C. 486; *Kelsy* v. *Wright*, 1 Root (Conn.) 83 (1783); *State* v. *Shaw*, 1 Root (Conn.) 134 (1789); *Hawkins* v. *Commonwealth*, 14 B. Mon. (Ky.) 395, 397-398 (1854); *Barnard* v. *Bartlett*, 10 Cush. (Mass.) 501, 503 (1852); *Commonwealth* v. *Reynolds*, 120 Mass. 190, 196 (1876); *Hughes* v. *State*, 196 Miss. 282 (1944); *State* v. *Smith*, 1 N. H. 346, 347 (1818); 1 East, *Pleas of the Crown*, 321-324; Foster, *Crown Law*, 320-321; and see the numerous cases set forth in the Note at 5 A. L. R. 263. See also *Gibson* v. *United States*, 149 F. 2d 381, 383 (C.A. D.C.), certiorari denied *sub nom. O'Kelley* v. *United*

States, 326 U. S. 724; *Lane* v. *United States,* 148 F. 2d 816 (C. A. 5), certiorari denied, 326 U. S. 720; *Paper* v. *United States,* 53 F. 2d 184 (C. A. 4); *United States ex rel. Flynn* v. *Fuellhart,* 106 Fed. 911, 913-914 (C.C. W.D. Pa.). We think it clear that Irwin's entry into petitioner's house was lawful, and that he had the right to make a reasonable search to determine whether Foster was there. Furthermore, he had the right to call upon the other two officers to help him. 28 U. S. C. (1946 ed.) 503, now 28 U. S. C. 547 (*supra,* p. 2).

Being lawfully on the premises looking for Foster, the officers saw in open view, without further search, the filtering apparatus and illicit liquor. They thereupon arrested petitioner, as was their right and duty; and, quite reasonably in the circumstances, they proceeded to search the rest of the premises and found other liquor and the distilling apparatus used to manufacture the liquor which they saw in the process of filtration. Although the record is silent on this score, it is reasonable to infer that in searching the rest of the house, the officers were pursuing their original purpose to find Foster as much as to ascertain whether there was more illegal liquor or a distillery in the house, for presumably they would have looked through the whole house even if they had not seen the liquor behind the first door they opened. The situation here, therefore, is one where officers who have lawfully entered upon premises (cf. *Johnson* v. *United States,* 333 U. S.

10; *McDonald* v. *United States,* No. 36, decided December 13, 1948), and who had no prior knowledge of a crime being committed there or even expectation of discovering crime and no purpose to search for the means of commission of a crime, come upon crime being committed before their very eyes. We submit that, in such circumstances, their arrest of petitioner and the subsequent search of his house and seizure of the contraband they found in such search were entirely reasonable, even without the support of the fact that they had a right to go through the whole house in their search for Foster. *Harris* v. *United States,* 331 U. S. 145; *Marron* v. *United States,* 275 U. S. 192, 198-199; *Paper* v. *United States,* 53 F. 2d 184 (C. A. 4).

Here, unlike the situations in *Trupiano* v. *United States,* 334 U. S. 699, and the *Johnson* and *McDonald* cases, the officers had no such prior knowledge of the violations being committed in petitioner's house as would have required them under those decisions to seek a search warrant. Instead, they were already lawfully *within* the house for a wholly different purpose when they discovered the violations. Consequently, "the time element and the foreseeability of the need for a search and seizure that made the warrant essential" [2] in those cases were absent here. We

[2] *Trupiano* v. *United States,* 334 U. S. 699, 709; see also *McDonald* v. *United States, supra,* slip opinion, p. 4; concurring opinion, p. 3.

think it was never intended to be said that officers who have come upon a crime by chance while lawfully within a house must desist until a search warrant can be obtained.

Petitioner contends (Pet. 6-7) that to permit a search of this character converts an arrest warrant into a general search warrant, lacking all the constitutional safeguards. This is obviously not so for the officer holding the arrest warrant may not enter a house unless he acts in good faith and has reasonable grounds for believing that the person named in the warrant is within. Furthermore, once within, the officer must conduct his search in a manner befitting its object and not engage in a general exploratory rummaging. On both these counts, the officers in the present case, as we have seen, behaved themselves in an exemplary fashion.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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